United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-2529

To be argued by
MELVIN I. FRIEDMAN

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

JAMES L. McCARTHY, HUBERTA McCARTHY, PETER F. FAY and SHARON L. FAY,
Plaintiffs,

SHARON L. and PETER F. FAY,
Plaintiffs-Appellants,

against

EAST AFRICAN AIRWAYS CORPORATION, BRITISH AIRCRAFT CORPORATION, Ltd., BRITISH AIRCRAFT CORPORATION (Commercial Aircraft), Ltd., BRITISH AIRCRAFT CORPORATION (Operating), Ltd., BRITISH AIRCRAFT CORPORATION (U. S. A.), Inc., DUNLOP LIMITED, DUNLOP HOLDINGS, DUNLOP CO. OF GREAT BRITAIN and BRITISH OVERSEAS AIRWAYS CORPORATION, now known as British Airways,
Defendants,

EAST AFRICAN AIRWAYS CORPORATION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFFS-APPELLANTS

KREINDLER & KREINDLER
Attorneys for Plaintiffs-Appellants
99 Park Avenue
New York, New York 10016
(212) 687-8181

Of Counsel
MELVIN I. FRIEDMAN
MILTON G. SINCOFF
JAMES J. SULLIVAN

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Questions Presented

1. Are American citizens, residents of New York, who brought this action for severe personal injuries against a foreign air carrier doing business in New York, to be denied jurisdiction by the Courts of the United States?

2. Did the Court below err in making a finding of fact, to wit, that a travel agency, an alleged agent of the defendant airline, could not sell the plaintiffs an airline ticket from Nairobi, Kenya to New York, New York?

3. Where the plaintiffs were destined for New York and the Court below found that the plaintiffs' ultimate destination was New York, did it err in holding that the "place of destination" under Article 28(1) of the Warsaw Convention was not New York merely because the airline ticket issued to the plaintiffs by the defendant's agent specified London, England rather than New York?

4. Did the Court below err in holding that it lacked power to exercise its pendent and ancillary jurisdictional powers?

5. Since diversity of citizenship jurisdiction exists between the American plaintiffs and the defendant foreign airline who does business in New York, does the total ouster of the plaintiffs from the Courts of the United States violate Sections 1 and 2 of Article III of the United States Constitution?

Preliminary Statement

The plaintiffs, Sharon and Peter Fay, appeal from the order entered by the Honorable Richard Owen, United States District Judge, Southern District of New York, entered on October 16, 1974, which order granted the defendant East African Airways Corporation's motion to dismiss for lack of subject matter jurisdiction. The memorandum and order of the Court below appears on page 71a of the Appendix and is reported in 13 Avi.L.Rep. 17,385 (S.D.N.Y. 1974).

Facts

Peter F. Fay, Sharon L. Fay and James L. McCarthy were severely injured on April 18, 1972 as the result of a crash of an East African Airways aircraft (App. 4a). Said aircraft was on a flight from Nairobi, Kenya to London, England via Addis Ababa, Ethiopia and Rome, Italy (App. 4a). The crash occurred on takeoff at the Hailie Salassie I International Airport in Addis Ababa, Ethiopia, (App. 4a).

The four plaintiffs commenced an action against the defendant East African Airways Corporation (hereinafter East African) and other defendants including British Aircraft Corporation, Ltd., British Aircraft Corporation (Commercial Aircraft), Ltd., British Aircraft Corporation (Operating) Ltd., British Aircraft Corporation (U.S.A.) Inc. (hereinafter referred to collectively as "British Aircraft Corporation"), the manufacturers and lessors of the subject aircraft to East African (App. 4a, 8a), and British Overseas Airways Corporation, the corporation which maintained and performed maintenance on the aircraft for East African (App. 8a).

The Fays, as well as the McCarthy plaintiffs, have undisputed subject matter jurisdiction over British Aircraft Corporation and BOAC, and the McCarthy plaintiffs have undisputed jurisdiction over East African.

The four plaintiffs are United States citizens. The Fays were and presently are citizens and residents of New York (App. 2a), and the McCarthy plaintiffs are citizens and residents of California (App. 2a). The defendant East African is a corporation existing under the laws of the East African community (consisting of Tanzania, Uganda and Kenya), with its principal place of business in Nairobi, Kenya (App. 2a-3a).

At the time of the crash, the McCarthy plaintiffs were traveling on a ticket purchased in California which provided for passage from Marin, California to Addis Ababa, Ethiopia and return (App. 4a).

The Fay plaintiffs purchased their ticket for passage on the subject aircraft from E.A. Sun, Sea and Safari, defendant East African's alleged agent (App. 12a), in Nairobi, Kenya (App. 54a).

The Fays were destined for New York (App. 12a-13a, 53a), and so advised the ticket agency on several occasions (App. 53a-54a). On each occasion the ticket agency advised the Fays that even though their destination was New York, it would be best to book the flight from Nairobi to London and, after arrival in London, to purchase their London to New York tickets from the same ticket agency's London office (App. 53a-54a).

All arrangements for the Fays' journey to New York were exclusively handled by E. A. Sun, Sea and Safari Travel Agency and their tickets were issued and delivered by said ticket agency (App. 54a). The Fays paid E. A. Sun, Sea and Safari for their tickets (App. 55a) and received a receipt from said ticket agency (App. 56a). The tickets issued to the Fays provided for transportation between Nairobi, Kenya and London, England.

Defendant East African admitted that the Fay tickets "were issued by an East African ticket office" (App. 43a), but that E. A. Sun, Sea and Safari could not issue any East African ticket whether it was between Nairobi and London or between Nairobi and New York with an intermediate stopping place in London (App. 42a).

The United States of America and the East African community were and are High Contracting Parties to the Warsaw Convention. The passage provided for by the Fay and McCarthy tickets and the subject flight were "inter-

national transportation" as defined by Article 1 of the Warsaw Convention.

The defendant East African moved to dismiss the claims of Mr. and Mrs. Fay on the ground that the Court below lacked jurisdiction over the subject matter of their claims. The airline's motion was predicated upon Article 28(1) of the Warsaw Convention which specifies four places where an action must be brought including "the Court at the place of destination." A similar motion was not made with regard to the claims of the McCarthy plaintiffs.

The Court below granted East African's motion to dismiss by finding that, although the plaintiffs' ultimate destination was New York, the ticket agency could not sell the plaintiffs a ticket to New York and that the destination specified in the ticket was controlling. The Court below also held that it could not exercise pendent or ancillary jurisdiction, and that Article 28(1) of the Warsaw Convention did not unconstitutionally deprive the American plaintiffs of access to the Court. The plaintiffs appealed.

Summary of Argument

It is respectfully submitted by the plaintiffs that the Court below erred in holding that Article 28(1) of the Warsaw Convention was not satisfied in the case at bar. Error in this regard resulted from a finding that was either mistaken or for a jury, *i.e.*, that a travel agency which acted as an agent for the defendant airline, could not sell the plaintiffs, residents of New York, a ticket to New York, and by holding that the place specified in the ticket controlled even though plaintiffs' place of destination was New York. Plaintiffs also contend that the Court below erred in holding that it lacked power to exercise pendent and/or ancillary jurisdiction over the Fay claims, and that this Court can and should exercise jurisdiction on said grounds. Plaintiffs further contend that if jurisdiction is

not upheld on one or the other of the above grounds that jurisdiction must nevertheless be taken because requisite diversity of citizenship exists between the parties and a refusal to take jurisdiction would violate Sections 1 and 2 of Article III of the United States Constitution.

POINT I

New York was the place of destination of the Fays, and therefore, Article 28(1) of the Warsaw Convention was satisfied.

Article 28(1) of the Warsaw Convention provides:

> "An action for damages must be brought, at the option of the plaintiff, . . . before the Court at the place of destination."

The Fay plaintiffs, citizens and domiciliaries of New York at the time of the accident, were destined for New York. Accordingly, the terms of Article 28(1) of the Warsaw Convention have been met. The order granting East African's motion to dismiss should, therefore, be reversed and the defendant's motion denied.

There is no basis in the record for the statement of the Court below that "E.A. Sun, Sea and Safari in Kenya was unable to sell plaintiffs a ticket to New York and could only provide them with passage to London." Indeed, the record demonstrates the contrary, or a jury could so infer. The ticket agency could have sold the Fays tickets from Nairobi to New York with an intermediate stop in London (App. 53a-54a). The ticket agency did not do so only because the ticket agency felt it would be best to book the flight from London to New York from the ticket agency's London office (App. 53a-54a). American plaintiffs should not be ruled out of Court on such a happenstance. It is evident that if the Fays, American citizens and residents of New York, had been told that East African would invoke Article 28(1)

in the event of an accident, they would have insisted on a ticket specifying New York.

The record is uncontradicted that the Fays' place of destination was New York. Even the Court below acknowledged that "plaintiffs intended to continue their journey on to New York from London, . . ." (App. 72a). Defendant East African asserts, however, and the Court below held, that despite the expressed intention of the plaintiffs, the place of destination referred to in the ticket is controlling. None of the cases cited by East African or the Court below in support of this proposition dealt with a factual situation similar to the case at bar.

Article 28(1) of the Warsaw Convention does not provide that an action for damages must be brought "before the Court at the place of destination specified in the airline ticket." It merely provides that the action must be brought "before the Court at the place of destination." The Fays' place of destination was New York. It must, therefore, be held that Article 28(1) was satisfied.

Additionally, it would not do violence to the purposes of Article 28(1) to give effect to the Fays' place of destination and hold that New York was said place. Article 28(1) was only intended to prevent the bringing of lawsuits in forums with

> "no substantial connection with an accident, or in courts that lack advanced judicial procedures." *Eck* v. *United Arab Airlines, Inc.,* 360 F.2d 804, 808 (2d Cir. 1966).

London, England (the destination referred to on the ticket) had no substantial connection with the accident, which occurred in Ethiopia. New York had a greater connection with this accident than London, England because the Fays were going home to New York when they were injured. This country, moreover, surely does not take a back seat to England as far as its judicial procedures are concerned.

The plaintiffs established that the ticket agency delivered the plane tickets to the Fays; that the tickets were issued by the airlines; that the ticket agency received payment for the tickets from the Fays; and that the airline derived revenue from the ticket agency and the Fays. It is thus clear that an agency-principal relationship existed between E.A. Sun, Sea and Safari and East African or, at a minimum, the ticket agency was authorized to act for the airlines.

The Fays have demonstrated that their destination was New York and that this fact was known to the agent for the air carrier. Thus, under Article 28 of the Warsaw Convention the Court below had jurisdiction because New York was their "place of destination."

It is axiomatic that the factual allegations of a complaint are considered true for the purposes of a motion to dismiss the complaint. *Otten* v. *United States,* 210 F.Supp. 729 (S.D.N.Y. 1962); *DiVito* v. *Greenstein,* 55 F.R.D. 58 (E.D.Pa. 1972). The complaint (App. 2a-21a) and the record in the case at bar supports plaintiffs' contention that E. A. Sun, Sea and Safari was acting as a ticket agent for East African Airways when it sold air passage to the Fays knowing their intended destination was New York, New York.

There is no doubt, moreover, that plaintiffs' claims against the air carrier are meritorious. East African is, at least in part, liable for the substantial personal injuries suffered by the Fay plaintiffs. Regardless of the outcome of this appeal, the Court below has jurisdiction over the identical claims against East African which are asserted by the McCarthy plaintiffs. Affirmance of this appeal will not remove the air carrier from the obligation of continuing in this litigation. Under these circumstances and in light of the finding by the Court below that the Fays' intended destination was New York, it is respectfully submitted that the order dismissing the claims of the plaintiffs

against defendant East African should be reversed and the defendant's motion denied. If this Court believes that there is nevertheless an issue of fact for jury determination, the order of dismissal should still be reversed and the defendant's motion denied.

POINT II

This Court can and should exercise its pendent or ancillary jurisdictional power over the claims asserted by the Fay plaintiffs against East African.

In the event that this Court concludes that New York was not the plaintiffs' "place of destination" within the meaning of Article 28(1) of the Warsaw Convention, this Court should nevertheless assume pendent or ancillary jurisdiction over the claims asserted by the Fays against East African.

It is well settled that where a federal court has proper subject matter jurisdiction over one claim for relief, the Court, in its discretion, can hear and determine other related claims of which it could not take cognizance were they independently presented by exercising its pendent or ancillary jurisdictional powers. Wright, *Law of Federal Courts*, §§ 9, 19 (1972).

The doctrine of pendent jurisdiction, like the related but broader doctrine of ancillary jurisdiction, is founded on basic principles of judicial economy, convenience and fairness to all parties. *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966). The doctrines are generally applied to permit the parties and the Court to present and determine all related claims, arising out of the same operative facts, at the same time and in the same forum. It is respectfully submitted that the circumstances in the case at bar are particularly appropriate to warrant taking jurisdiction of the Fay plaintiffs' claims against East African.

The individual claims for relief in the amended complaint filed in this action all arise out of the identical operative facts. All of the plaintiffs herein were permanently and seriously injured as a result of the subject accident. Each of the injured plaintiffs allege the identical claims for relief against the several corporate defendants. The McCarthy plaintiffs have undisputed jurisdiction over East African and defendants British Aircraft Corporation and BOAC. The instant plaintiffs also have undisputed jurisdiction over defendants British Aircraft Corporation and BOAC. Thus, all the claims of all the plaintiffs are closely related and identical regarding liability.

The doctrine of pendent jurisdiction was developed to enable a federal court to exercise jurisdiction over a claim as to which it had no independent basis for jurisdiction where it already had proper jurisdiction of a related federally cognizable claim. *Gabel* v. *Hughes Air Corporation,* 350 F.Supp. 612 (C.D. Cal. 1972). Cf. *Jacobs* v. *United States,* 367 F.Supp. 1275 (D.Ariz. 1973). This Court already has jurisdiction over several federally cognizable cases and claims—the Fay plaintiffs' claims against British Aircraft Corporation and BOAC, and the McCarthy plaintiffs' claims against East African, British Aircraft Corporation and BOAC. This Court has, moreover, recognized that the doctrine of pendent jurisdiction applies to pendent parties as well as claims. *Leather's Best, Inc.* v. *S.S. Mormaclynx,* 451 F.2d 800 (2d Cir. 1971); *Astor-Honor, Inc.* v. *Grosset and Dunlap, Inc.,* 441 F.2d 627 (2d Cir. 1971); *Almenares* v. *Wyman,* 453 F.2d 1075 (2d Cir. 1971), *cert. denied* 405 U.S. 944 (1972).

The result and the reasoning in *Wittersheim* v. *General Transporation Services, Inc.,* 378 F. Supp. 762 (E.D. Va. 1974), is persuasive and has applicability herein. The plaintiff in *Wittersheim* and one of the defendants were citizens of the same state. (An independent lawsuit would, therefore, not have been maintainable, just as it would not

be maintainable herein if the Court holds that Article 28(1) jurisdiction is lacking.) There was, however, diversity as to a co-defendant. The first question faced by the *Wittersheim* Court was whether pendent jurisdiction could rest on diversity as well as upon federal question jurisdiction, as was the situation in the *Gibbs* case. The Court answered this question in the affirmative, citing *Stone* v. *Stone,* 405 F.2d 94 (4th Cir. 1968) and *Jacobson* v. *Atlantic City Hospital,* 392 F. 2d 149 (3d Cir. 1968).

The Court in *Wittersheim* recognized that pendent jurisdiction in *Gibbs* rested upon a pendent claim against the same defendant rather than a pendent claim against a co-defendant, as was the case in *Wittersheim.* The Court, relying on *Moore** v. *County of Alameda,* 411 U.S. 693, 713-715 (1973), nevertheless held that the doctrine of pendent jurisdiction included pendent parties. The Court in *Wittersheim* then went on to state:

> "As set forth in *Gibbs,* the following additional factors should be present before the court may properly exercise its power of pendent jurisdiction: (1) the relationship between the primary claim and the pendent claim must permit the conclusion that the entire action comprises but one claim; (2) the primary claim must be one of substance; (3) the primary claim and the pendent claim must arise out of a common nucleus of operative facts; (4) the primary claim and the pendent claim must be such as would ordinarily be tried in one judicial proceeding." 378 F. Supp. at 765.

There can be no doubt that these criteria are satisfied in the instant case. Reviewing the above criteria in order,

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* In *Moore,* the Supreme Court stated as follows:
"It is true that numerous decisions throughout the courts of appeals since Gibbs have recognized the existence of judicial power to hear pendent claims involving pendent parties where 'the entire action before the court comprises but one constitutional "case" ' as defined in Gibbs." 411 U.S. at 713.

the relationship between the diversity claims of the Fays against British Aircraft Corporation and BOAC and the claims of the McCarthy plaintiffs against East African, British Aircraft Corporation and BOAC and the pendent claim of the Fays against East African are so intermingled that they must be considered one claim. The claims against British Aircraft Corporation and BOAC are clearly claims of substance. All of the matters in controversy arise out of the subject crash and, therefore, they arise from a common nucleus of operative facts. Finally, all of the claims are so interwoven that they would ordinarily be tried in one judicial proceeding.

While the decision to invoke pendent or ancillary jurisdiction is generally made by a district court, this Court has independent power to invoke the said doctrines. *Drachman* v. *Harvey,* 453 F.2d 722 (2d Cir. 1971), on *rehearing in banc* 453 F.2d 736, 737-738 (2d Cir. 1972); *Travis* v. *Anthes Imperial Limited,* 473 F.2d 515, 528 (8th Cir. 1973).

In each case, the Court is to exercise its discretion to determine the appropriateness of pendent jurisdiction. The federal claim properly asserted need not arise under a particular statute, nor is there any strict requirement that the pendent claim be specifically recognized under state law. The doctrine was developed to enable the Court to exercise jurisdiction over any non-federal claim where it already had proper jurisdiction over a related federally cognizable claim. In some instances, pendent jurisdiction has been invoked where the jurisdictional amount in controversy was lacking. In other instances, it has been used where the requisite diversity of citizenship was wanting. *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966); *Aguayo* v. *Richardson,* 473 F.2d 1090 (2d Cir. 1973); *Leather's Best, Inc.* v. *S.S. Mormaclynx,* 451 F.2d 800 (2d Cir. 1971); *Hatridge* v. *Aetna Casualty & Surety Company,* 415 F.2d 809 (8th Cir. 1969); *Jacobson* v. *Atlantic City Hospital,* 392 F.2d 149 (3d Cir. 1968); *Wilson* v. *American*

Chain & Cable Company, 364 F.2d 558 (3d Cir. 1966); *Wittersheim* v. *General Transp. Services,* 378 F.Supp. 762 (E.D.Va. 1974); *General Research, Inc.* v. *American Employers' Ins. Co.,* 289 F.Supp. 735 (W.D.Mich. 1966); *Johns-Manville Sales Corp.* v. *Chicago Title & Trust Co.,* 261 F.Supp. 905 (N.D.Ill. 1966). In all instances, however, pendent jurisdiction has been invoked when a need for convenience and fairness dictated its application.

It is well-settled within this circuit that pendent jurisdiction is to be liberally applied where it will promote substantial justice and judicial economy. *Aguayo* v. *Richardson, supra* at 1102; *Astor-Honor, Inc.* v. *Grosset and Dunlap, Inc.,* 441 F.2d 627 (2d Cir. 1971). The failure to reverse the order of dismissal below will effectively deprive the Fay plaintiffs of all their rights against the air carrier. The Fays cannot afford to retain a lawyer in London, England or Nairobi, Kenya because contingency retainer arrangements are not available in those forums, and the additional travel expense that would be necessarily involved would be enormously prohibitive for the Fays. Regardless of the outcome of this appeal, the Court below will hear and the air carrier will be obligated to defend identical issues of liability alleged by the McCarthy plaintiffs. In light of these circumstances, affirmance of the order of dismissal below would in no way promote substantial justice and judicial economy. Surely, the real prejudice to these American plaintiffs clearly outweighs any claim of prejudice by the defendant air carrier.

The Court below held that it lacked power to exercise pendent or ancillary jurisdiction over the claims of the Fay plaintiffs because of this Court's decision in *Smith* v. *Canadian Pacific Airways, Ltd.,* 452 F.2d 798 (2d Cir. 1971). In particular, the Court quoted the following from the *Smith* case:

> "We therefore look to the Convention to determine its applicability here. Only if it does apply so as to

> permit of treaty jurisdiction need we answer domestic jurisdiction and venue questions. If treaty jurisdiction under the Convention does not apply, federal jurisdiction under 28 U.S.C. § 1331(a) which permits cases arising under United States treaties, clearly cannot be established. Similarly, if the Convention precludes suit, our inquiry ceases without an examination of diversity jurisdiction under 28 U.S.C. § 1332 (a)(2); in other words, treaty provisions, being of equal constitutional status, may operate under Article VI of the Federal Constitution as limitations on diversity jurisdiction, just as the requirements of jurisdictional amount may so operate." 452 F.2d at 802.

It is respectfully submitted that the Court below misread and overly extended the holding in *Smith*. There is absolutely no mention of the doctrines of ancillary and pendent jurisdiction in the *Smith* case. It is clear that in speaking of "domestic jurisdiction" questions the *Smith* Court only had in mind federal question and diversity jurisdiction, not pendent and ancillary jurisdiction.

Further, if the doctrines of ancillary and pendent jurisdiction can be applied despite Congressional statutes which only give jurisdiction when there is diversity or where the jurisdictional amount is satisfied, there is no rhyme or reason why the doctrines of pendent and ancillary jurisdiction cannot be invoked where a treaty provision has not been satisfied in the first instance. Surely, a treaty of the United States does not rise any higher than a Congressional statute. Indeed, this Court so stated in the quotation from the *Smith* case set forth above.

In sum, should this Court conclude that there is no Article 28(1) jurisdiction as to the plaintiffs, this Court can and should exercise its discretion and invoke its pendent or ancillary jurisdictional power over the plaintiffs' claims against East African.

POINT III

To deny the Fays access to the federal courts would violate their constitutional rights.

If this Court determines that Article 28(1) jurisdiction is lacking and does not exercise pendent or ancillary jurisdiction over the claims of the infant plaintiffs against the air carrier, the plaintiffs respectfully submit that an affirmance of the dismissal below would be contrary to and in conflict with Sections 1 and 2 of Article III of the Constitution of the United States.

U. S. Constitution, Article III, § 1

The Constitution vests the power to declare the jurisdiction of the federal courts in the Congress:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the *Congress* may from time to time ordain and establish." (Emphasis supplied.)

The Congress, of course, means the Senate *and* the House of Representatives. The Warsaw Convention Treaty is not an act of Congress. Even assuming that Congress could have prescribed the diversity jurisdiction of the federal courts, it is evident that the *Congress did not do so.*

The operative effect given to Article 28(1) of the Warsaw Convention in the case at bar by the Court below has the result of denying an American citizen the right to have his claim heard in any American court, not just the federal courts. Assuming *arguendo* that American courts may in some instances be totally ousted from hearing suits, it is respectfully submitted that such a limitation on the jurisdiction of federal courts cannot be accomplished through the passage of a treaty alone. If permissible at all, the limitation of jurisdiction on an Article III court must be

accomplished through the passage of legislation enacted by the Congress as a whole, not by the Senate alone acting through the treaty power.

Even assuming that the Warsaw Convention is a "self-executing" treaty in the sense that it needs no Congressional implementation to make it and its provisions creating a rebuttable presumption of liability (Article 17) and limitations thereon (Article 25) constitutionally enforceable,* the treaty cannot be regarded as self-executing with respect to the matter of federal jurisdiction because the power over jurisdiction is solely vested in both Houses of Congress. Article 28(1) of the Warsaw Convention has not been implemented by both Houses of Congress and, therefore, cannot be enforced.

An example of the limitation on the treaty power in favor of the entire Congress is the rule that treaties involving appropriations of money are not self-executing. 5 Hackworth, *Digest of International Law,* p. 188. This is because the Constitution provides that such appropriations must originate in the House of Representatives. Thus, treaties approved only by the Senate cannot authorize expenditures without the approval of implementing legislation by the House.

In this connection, the Restatement of Law, Foreign Relations Law of the United States (Second), § 141 provides:

> "f. *Constitutional Limitation on Self-Executing Treaties.* Even though a treaty is cast in the form of a self-executing treaty, it does not become effective as domestic law in the United States upon becoming binding between the United States and the other party or parties, if it deals with a subject matter that by the Constitution is reserved *exclusively to Congress.* For

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* See *Smith* v. *Canadian Pacific Airways, Ltd.,* 452 F.2d 798, 801-802 (2d Cir. 1971).

example, only the Congress can appropriate money from the Treasury of the United States." *Id.* at 435. (Emphasis in the original.)

Federal court jurisdiction is one such subject matter which is reserved to the Congress. The Supreme Court has held that the vesting and withdrawing of jurisdiction is a power particularly vested in the Congress:

> "[T]he judicial power of the United States . . . is . . . dependent for its distribution and organization, and for the modes of its exercise, *entirely upon the action of Congress,* who possess the *sole power* of creating the tribunals . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Cary* v. *Curtis,* 44 U.S. (3 How.) 236, 245 (1845). (Emphasis added.)

Before changes can be made in the power and jurisdiction of federal courts, the law making said changes must have the concurrence of both Houses of Congress. Accordingly, until the Congress as a whole adopts legislation implementing Article 28(1) and modifying the diversity jurisdiction of the federal courts, Article 28(1) cannot be given any force or effect.

In *Smith* v. *Canadian Pacific Airways,* 452 F.2d 798 (2d Cir. 1971), this Court was not presented with the Constitutional issue herein discussed. In holding that the Warsaw treaty modified the federal diversity statute, the Court relied on the fact that the requirement of a jurisdictional amount ($10,000) was added as a limitation on diversity jurisdiction. The Court in *Smith* did not mention the fact that the "amount in controversy" requirement was enacted by the *Congress,* the body vested by the Constitution with the power to establish the jurisdiction of the federal courts.

The President and the Senate, however, were not given any power by the Constitution to limit the diversity jurisdiction of the federal courts.

U. S. Constitution, Article III, § 2

Said section of Article III, provides:

> "The judicial power shall extend to all cases in law and equity . . . between a state, or citizens thereof, and foreign states, citizens or subjects."

In the instant case, the Fays, citizens of New York, are suing East African Airways, a corporation which is a citizen of the African country of Kenya, and other defendants who are non-New York citizens. It is well-settled that diversity of citizenship among the parties gives the Fay plaintiffs the *Constitutional right* to pursue their claims against the foreign air carrier in a federal court. *Cohens* v. *Virginia,* 19 U.S. (6 Wheat.) 264 (1821). In *Cohens, supra,* Chief Justice Marshall held as follows:

> "The second section of the third article of the constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the Courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. . . .
>
> "In the second class [diversity of citizenship], the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more States, between a State and citizens of another State,' 'and between a State and foreign States, citizens or subjects.' *If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the Courts of the Union."* (Emphasis added.) *Cohens, supra* at 378.

See also *The Sapphire,* 78 U.S. (11 Wall) 164 (1870), wherein it was held that a foreign sovereign or any other foreign person had a Constitutional right, without reference to the subject matter of the controversy, to access to the federal courts when suing a citizen of the United States.

In *The Falls of Keltie,* 114 F. 357 (D.Wash. 1902), the issue was whether the Court's admiralty jurisdiction could be ousted by a consular treaty if the plaintiff was an American citizen. In holding that its admiralty jurisdiction could not be so ousted, the Court stated:

> "Certainly this court has no right to refuse its process when demanded by any citizen of the United States. By the constitution of the United States, the people have ordained that judicial power shall be vested in the supreme court, and in inferior courts to be established by law, and that the judicial power shall extend to all cases of admiralty and maritime jurisdiction. The manifest purpose of these provisions is to insure to citizens of the United States means for the redress of wrongs and the enforcement of legal rights. In some branches of jurisprudence the jurisdiction of the federal courts is concurrent with that of the local courts created by and existing under state laws, but the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and cognizance thereof is given to the national courts exclusively. The J. E. Rumbell, 148 U.S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345; The Glide, 167 U. S. 606-624, 17 Sup. Ct. 930, 42 L. Ed. 296. The executive and legislative branches of the government have no power to remit cases of admiralty and maritime jurisdiction for adjudication to any tribunal other than a court established and organized pursuant to the constitution. Jurisdiction of this class of cases cannot be conferred upon state courts by any law enacted by any state, nor by congress; and, a fortiori, no citizen of this country, having a cause cognizable in a court of

> admiralty, can be required by any law or treaty to seek an adjudication thereof in any foreign country, nor be denied the right to invoke the jurisdiction of the courts specially established pursuant to the constitution for the purpose of rendering justice in such cases. I consider that this court is bound to take cognizance of this case for the purpose of deciding the disputed question whether the libelant Swanson is or is not a citizen of the United States, and, if the court shall find in his favor on that issue, then it must proceed to a final adjudication of all questions which are properly alleged in the libel."

In the same vein, it is undisputed that the Fay plaintiffs, American citizens and residents of New York, have met the constitutionally prescribed (Article III, § 2) and the congressionally enacted (28 U.S.C. § 1332(a)(2)) requirements of diversity jurisdiction. Accordingly, they are entitled by the Constitution and the laws promulgated pursuant thereto to have their claims heard by a federal court.

The plaintiffs respectfully submit that the Warsaw Convention, as a treaty, cannot usurp the plaintiffs' constitutional right of access to the federal courts. It is well-settled that the treaty-making power does not extend so far as to permit what the Constitution forbids. *Geofroy* v. *Riggs*, 133 U.S. 258, 267 (1889). The Constitution, its provisions and dictates, are clearly supreme to the treaty-making powers of the executive. *Reid* v. *Covert*, 354 U.S. 1 (1957); *United States* v. *Minnesota*, 270 U.S. 181 (1926); *The Cherokee Tobacco*, 78 U.S. (11 Wall) 616 (1871). Thus, where a treaty provision is in conflict with the Constitutional right, the treaty must be deemed subordinate and must be construed in concert with the Constitution to avoid a conflict. It should be noted in this connection that it would not be necessary for this Court to declare the entire Warsaw Convention unconstitutional. It is well established that even though a part of an enactment is found to be unconstitutional, the remainder may be sustained if the valid

parts, standing alone, can be given legal effect. *Utah Power & Light Co.*, v. *Pfost*, 286 U.S. 165 (1932); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942); *Corporation Comm'n of Oklahoma* v. *Champlin Refining Co.*, 286 U.S. 210 (1932); *Keller* v. *Potomac Electric Power Co.*, 261 U.S. 428 (1923); *Board of Trade* v. *Olsen*, 262 U.S. 1 (1923); *Ohio Tax Cases*, 232 U.S. 576 (1914).

American citizens are given the right under Article III, § 2 of the United States Constitution and 28 U.S.C. § 1332(a)(2) to come into federal court to sue foreign citizens. The Warsaw Convention cannot override that right.

For all of the above reasons, the plaintiffs respectfully submit that Article 28(1) of the Warsaw Convention cannot be construed to deny to the Fays' access to the federal courts. Only the Congress can prescribe the jurisdiction of the federal courts, which it has done by enacting 28 U.S.C. § 1332(a)(2), and the Constitution specifically grants access.

CONCLUSION

The order below dismissing the plaintiffs' claims against the defendant East African should be reversed and the defendants' motion to dismiss denied.

Respectfully submitted,

KREINDLER & KREINDLER
Attorneys for Plaintiffs-Appellants
99 Park Avenue
New York, New York 10016

Of Counsel:

MELVIN I. FRIEDMAN
MILTON G. SINCOFF
JAMES J. SULLIVAN